No. 89-515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,
v.
TIMOTHY W., BY AND THROUGH HIS MOTHER AND NEXT FRIEND, CYNTHIA W.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.1 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief. Respondent has denied consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments.

The decision of the United States Court of Appeals for the First Circuit in *Timothy W. v. Rochester, New Hampshire, School District*, 875 F.2d 954 (1st Cir. 1989), alters the constitutional balance between the States and the federal government. The court of appeals' interpretation of the Education of the Handicapped Act (the "EHA" or the "Act"), 20 U.S.C. § 1400 *et seq.*, would require school districts to allocate substantial educational resources to children whose handicaps are so severe that they cannot benefit from such educational expenditures, thereby reducing the resources available for children who can so benefit.

Currently, all fifty States and the District of Columbia receive funding assistance under the EHA. United States Dept. of Education, *Ninth Annual Report to Congress on Implementation of Education of the Handicapped Act* (1987). Enacted in 1975, the Act sought to improve educational opportunities for handicapped children by providing federal funding to relieve the fiscal burden faced by States and local education authorities in educating handicapped children and by establishing substantive and procedural rules governing the provision of such special educational services.

The vast majority of funds needed to fulfill the statute's requirements, however, is paid by state governments and local school districts. Although the Act authorized increasing federal appropriations—ultimately to provide approximately twenty percent of the average cost of special education for handicapped students [1]—the actual pro-

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[1] The Act provided for appropriations reaching, by 1982, forty percent of the average per pupil expenditure for all students in public elementary and secondary schools in the United States. 20

portion of federal funding reached only 6.5 percent by 1981 (Pittenger & Kuriloff, *Educating the Handicapped: Reforming a Radical Law*, 66 Pub. Interest 72, 87 (Winter 1981)).

The First Circuit's ruling in this case would force States and local school districts to bear additionally the severe financial burden of providing costly educational services to children who, unfortunately, are incapable of benefitting from such services. In the instant case, the federal government funds only two percent of the costs of respondent's care.[2] As representatives of state and local government participants under the EHA, *amici* are gravely concerned by the First Circuit's imposition of a new and substantial financial obligation that is both unwarranted by the purposes of the EHA and vastly disproportionate to the financial assistance conferred under the Act.

The holding below also would require school districts to divert scarce funds away from educational services to those students, handicapped and nonhandicapped, who are able to benefit from such resources to care that is essentially medical and custodial for children who cannot benefit from educational services. The desire to provide services to children like Timothy W. and their families

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U.S.C. § 1411(a)(1)(B)(v). Since the average cost of special education is about twice (and for children like Timothy W., many more times) the cost for education of nonhandicapped students (United States Dept. of Education, *Eleventh Annual Report to Congress on Implementation of Education of the Handicapped Act* 146, Table 52 (1989)), the proportion of expenditures for handicapped student education that the Act would have provided, even if fully funded, is approximately half the percentage provided in the statute, or twenty percent.

[2] Of approximately $15,000 presently expended for services for Timothy, the federal government pays only $300, leaving the balance of the burden to be borne by the State of New Hampshire and the Rochester School District. See Appendix I to petitioner's brief in the court below, at 132.

is surely understandable. But any such program must be carefully assessed—and funded by federal and state legislatures, not imposed on the States by a federal court's expansion of a federal statute long after the States made their decisions whether to accept the limited federal funding and the attached conditions.

Public education is near crisis, as school boards confront ever more constrained funding in the face of demands for improved student performance. See, *e.g.*, National Governors' Association, *Time for Results: The Governors' 1991 Report on Education* 5 (1986) (United States eighth grade students rank ninth in math skills among twelve major industrialized nations; one-third of college freshmen read below seventh grade level; and American teenagers' math and science abilities, on average, declined between 1971 and 1982).[3] *Amici* fear that the decision below will force school districts to reduce funding for all other students and therefore to compromise the quality of education for their educable young by divesting state and local government education authorities of their traditional control over the allocation of scarce educational funding. The First Circuit's decision threatens to throw askew the delicate balance of federal-state relations in an area of historical local concern.

Because the issues presented by this case are of exceptional importance to *amici* and their members, and because *amici*'s perspective may help illuminate the significant and troubling federalism implications of the

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[3] In a recent speech to the Governors' Education Summit at the University of Virginia, President Bush, vowing to release state and local educational initiatives from the grip of restrictive federal regulation, warned of the potential dangers facing this country in its educational system: "No modern nation can long afford to allow so many of its sons and daughters to emerge into adulthood ignorant and unskilled. The status quo is a guarantee of mediocrity, social decay and national decline." The White House, Office of the Press Secretary, Charlottesville, Virginia, Remarks by the President during University Convocation (Sept. 28, 1989).

court of appeals' decision, *amici* respectfully move for leave to file the attached brief in support of petitioner.

Respectfully submitted,

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October 27, 1989

QUESTIONS PRESENTED

1. Whether Congress must unambiguously express its intent as to conditions imposing severe financial obligations upon state and local government recipients under a federal grant statute.

2. Whether Congress has, in enacting the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, unambiguously expressed its intent to impose financial burdens that far exceed the federal funds provided and that will produce no educational benefits.

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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

Respondent Timothy W. is a thirteen-year-old child with extensive mental and physical disabilities. Severe respiratory and brain disorders have resulted in extreme brain damage, leaving Timothy with "virtually no cortical tissue." App. II, 188.[1] Timothy's doctors concluded that he "has no potential for development of self-care functions and has no educational potential." App. IV, 762. "[A]ll but the bottom of [his] brain ha[s] been destroyed by the hydrocephalus. Timmy functions as a reflex individual." App. IV, 784. These professional opinions were the basis of petitioner's conclusion in early 1980 that Timothy had no learning capacity and that he was therefore ineligible for educational services under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, a federal-state grant program in which New Hampshire participates. Despite Timothy's continued receipt of medical care and physical therapy pursuant to the Supplemental Security Income Program of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, Timothy's mother applied for special education services for her son. She refused a comprehensive evaluation of Timothy to determine whether his condition had improved since his last evaluation in 1980, and, absent information contradicting its earlier findings, petitioner concluded that Timothy was ineligible for educational services under the EHA.

Timothy's mother filed this lawsuit on his behalf seeking injunctive relief and $175,000 in damages. The district court denied a motion for a preliminary injunction and abstained until Timothy exhausted all administrative remedies under the EHA. Subsequently, Timothy received numerous educational assessments and diagnostic tests, all of which confirmed that he is incapable of any meaningful learning. For example, a specialist in pediatric

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[1] App. cites are to the appendix filed with the brief of petitioner, as appellee, in the court of appeals.

neurology concluded that Timothy's "potential for learning with such a degree of central nervous system damage is practically nonexistent." App. IV, 1031; see App. II, 192-96; App. IV, 900, 1028-30, 1053.

The state administrative hearing officer, construing federal requirements under the EHA, held that Timothy qualified for educational services under the Act and its state counterpart, N.H. Rev. Stat. Ann. § 186-C (Supp. 1988). The hearing officer based his decision on an interpretation of federal law, concluding that all handicapped children, regardless of whether they are "capable of benefitting from special education," must be provided with such services. Pet. App. 60a. Petitioner challenged the decision by filing a counterclaim in Timothy's lawsuit.

The district court granted summary judgment for petitioner, holding that the EHA does not require States to provide an education to children who cannot benefit from it. The court relied on this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), concluding that "Congress would not legislate futility!" Pet. App. 47a.

The court of appeals reversed and held that the district court had misinterpreted the EHA. The court of appeals based its holding primarily on the fact that the EHA is "permeated with the words '*all* handicapped children' whenever it refers to the target population." Pet. App. 12a (emphasis in original). The court of appeals did not overturn the lower court's factual determination that respondent possesses no capacity for meaningful learning.

ARGUMENT

I. CONGRESS DID NOT UNAMBIGUOUSLY STATE ITS INTENT TO FORCE UPON LOCAL SCHOOL DISTRICTS FINANCIAL BURDENS THAT FAR EXCEED THE FEDERAL FUNDS PROVIDED AND PRODUCE NO EDUCATIONAL BENEFITS.

Congress indisputably "may fix the terms on which it shall disburse federal money to the States." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (*"Pennhurst I"*). Nonetheless, when Congress enacts legislation pursuant to its spending power, if it "intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[2] *Id.* (footnote omitted). Holding that a conditional grant statute like the EHA is "much in the nature of a contract[,]" the Court there admonished Congress to speak with a sufficiently "clear voice[] t[o] enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.*

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[2] This Court has not previously determined whether the EHA was enacted pursuant to Congress's authority under Section 5 of the Fourteenth Amendment or under the Spending Clause, U.S. Const., Art. I, § 8. Most recently, in *Dellmuth v. Muth*, 109 S. Ct. 2397, 2400 n.1 (1989), the Court expressly declined to decide the issue, inasmuch as petitioner there conceded that the EHA was enacted under Congress's Fourteenth Amendment powers. An earlier decision of this Court, however, strongly suggests that Congress derived its authority for the Act from its spending power. *Board of Education v. Rowley*, 458 U.S. 176, 204 n.26 (1982). *Amici* here assume that the EHA was enacted pursuant to Congress's spending power. This Court established in *Pennhurst I* that the Court would be especially circumspect in inferring congressional intent to wield its Fourteenth Amendment authority. "The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst I*, 451 U.S. at 16-17 (emphasis in original).

In *Pennhurst I*, this Court found that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, imposed no affirmative obligations on state recipients. The Court based its decision in part on the clear disparity between the "woefully inadequate" federal funds provided and the "enormous financial burden" that such obligations would have imposed. 451 U.S. at 24. This Court has found that Congress did impose on participating States certain affirmative obligations to provide appropriate educational services to handicapped students. *Rowley*, 458 U.S. at 183; *Honig v. Doe*, 108 S. Ct. 592, 597 (1988). While school district recipients have assumed such obligations, the First Circuit's application of the EHA would grossly distort the financial burden for special education borne by local governments relative to the funds provided under the federal grants. "When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation on participating States." *Pennhurst I*, 451 U.S. at 24 (citation omitted). The overwhelming disparity between burdens and benefits here suggests application of the most exacting scrutiny to find that Congress could have intended, and that the States knowingly and voluntarily could have accepted, the imposition of such obligations.

The clear intent of Congress in enacting the EHA was "to assist States and localities to provide for the education of all handicapped children." 20 U.S.C. § 1400(c). Congress expressly found that if they were "given appropriate funding," state and local government educational agencies would provide effective special education to handicapped children but that "present financial resources [were] inadequate" and that "it [was] in the national interest that the Federal Government assist State and

local efforts to provide programs to meet the educational needs of handicapped children." 20 U.S.C. § 1400(b)(7)-(9).

Not only does the First Circuit's interpretation of the EHA defy the clear intent of Congress, as manifested by the statement of the Act's goals and findings, but the court below ignored cautionary language of this Court to regard a grant statute like the one at bar "'as a cooperative program of shared responsibilit[ies], not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund.'" *Pennhurst I*, 451 U.S. at 22 (quoting *Harris v. McRae*, 448 U.S. 297, 309 (1980)).

The First Circuit also devotes considerable space to an examination of legislative history of the EHA and subsequent amendments to it. Pet. App. 16a-29a. Just last Term, in *Dellmuth*, the Court held that the statutory language of the EHA did not evince a clear congressional intention to abrogate the States' Eleventh Amendment immunity from suit. The Court also stated that the rule of statutory construction applied in Eleventh Amendment cases like *Dellmuth* applies in other contexts as well. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2308 (1989).[3] As the Court admonished: "[i]f Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile." *Dellmuth*, 109 S. Ct. at 2401.

Furthermore, the First Circuit's reliance on the legislative history of the amendments to the EHA (Pet. App. 24a-29a) is particularly misplaced because the court mis-

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[3] The Court cited *Pennhurst I*, 451 U.S. at 16, and *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), both involving interpretation of federal statutes that impose conditions on the grant of federal moneys.

interprets the clear import of the amendments themselves. In amending the Act in 1977 and again in 1983, Congress clearly contemplated the possibility of cases like the one at bar, in which the severity of children's handicaps, combined with inadequacy of knowledge, technology, and financial resources at the state and local level, would create an impossible burden for local school districts. Therefore, Congress authorized the appropriation of federal money expressly for the purpose of shouldering the tremendous financial burden of advancing learning and technology to permit the States to help " 'even the most severely handicapped child[ren] [to] be made less dependent through education.' " Pet. App. 28a (quoting 132 Cong. Rec. S7038 (1986) (remarks of Sen. Stafford)). See 20 U.S.C. §§ 1421-24 (establishing federal grant authorization for special resource centers and research projects to reach the special needs of severely handicapped children).

Congress's creation of separate grant programs to fund leading edge research into methods for educating children like Timothy, who, because of the severity of their handicaps and the state of the science, are presently uneducable, clearly indicates *both* that Congress did not intend to require States to exhaust scarce education dollars in providing services to the uneducable *and* that Congress intended to bear the burden of developing educational knowledge and technology in these areas where benefits presently are overwhelmed by costs.

In sum, given the substantial financial burdens that the First Circuit's application of the EHA would impose upon petitioner and other state and local governments represented by *amici*, compared with the modest federal funds provided under the Act, this Court should grant the petition for a writ of certiorari to determine the propriety of the First Circuit's interpretation of the EHA in light of the precedents established by this Court.

II. CONGRESS DID NOT UNAMBIGUOUSLY STATE ITS INTENT TO ABROGATE THE STATES' TRADITIONAL AUTHORITY OVER EDUCATIONAL POLICY.

Since the early days of this Republic, public education has been regarded primarily as the means by which a democratic society invests in the preservation of self-government. See, *e.g.*, N. Webster, "On the Education of Youth in America" (1790), in *Essays On Education In The Early Republic* 64 (F. Rudolph ed. 1965). The same is no less true today, as one modern political philosopher observes: "Education, in a great measure, forms the moral character of citizens, and moral character along with laws and institutions forms the basis of democratic government." A. Gutmann, *Democratic Education* 49 (1987).

Congress expressly recognized this in enacting the EHA by acknowledging that public education

> is vital to secure the future and the prosperity of our people . . . .
>
> With proper education services, many [handicapped children] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975).

In this case, there is, unfortunately, no realistic hope that Timothy W. and others situated similarly to him would ever "reduc[e] their dependence on society," much less "become productive citizens" in accordance with the purposes of the EHA. This is not to say that a just society does not provide for its unfortunate citizens. On the contrary, here ample medical services are available to respondent under a comprehensive state statute that affords care to the developmentally disabled. N.H. Stat.

Ann. § 171-A (Supp. 1988). But, when and where society does so care for its unfortunates, we properly do not refer to such care as "education," and we do not burden an educational system already laboring under one essential task with the additional obligation of providing for that costly care.

Education has been regarded traditionally as a governmental function of uniquely local concern. This Court has previously held that the "most persistent and difficult questions of educational policy" should be left to the "informed judgments made at the state and local levels." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973). In fact, the Court there ascribed particular significance to the principle that local school districts should retain "a large measure of authority as to how available funds will be allocated." *Id.* at 51.[4] The provisions of the EHA are not, and should not be read, to the contrary. The Act provides that the recipient States and their local education agencies should have primary responsibility for the administration of "all educational programs for handicapped children within the State[.]" 20 U.S.C. § 1412(6).

Amici are concerned that the interpretation of the First Circuit in this case would do substantial violence to the deference properly accorded local educational authorities both by the precedents of this Court and by the express terms of the EHA. The Court should grant the petition to restore the proper balance under the federal program.

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[4] In a speech to the 1989 Governors' Education Summit (see attached Motion for Leave to File Brief, n.3), President Bush promised the assembled Governors that he would "work with [them] to loosen the grip of federal restrictions. How many great ideas, how many grand and noble experiments, have been impaled on the spike of a federal directive? Unnecessary restriction is the enemy of the bold. And bold action is what we need most of all."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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